

2005 DRAFTING REQUEST

Bill

Received: **01/03/2006**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Michael Huebsch (608) 266-2401**

By/Representing: **Jodi J**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - immunity liability**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Huebsch@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Noneconomic damages , contingency fees in medical malpractice

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 01/05/2006	lkunkel 01/25/2006		_____			
/1			rschluet 01/25/2006	_____	sbasford 01/25/2006		
/2	rnelson2 02/03/2006	lkunkel 02/14/2006	rschluet 02/14/2006	_____	mbarman 02/14/2006	sbasford 02/15/2006	

FE Sent For: *none*

<END>

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/1			rschluet 01/25/2006		sbasford 01/25/2006		

FE Sent For:

/2/mk 3/4

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No specific pre topic given

Topic:

Noneconomic damages , contingency fees in medical malpractice

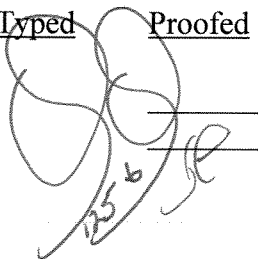
Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/?	rnelson2	1/4/1 [ink] 1/25 OK/1					
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FE Sent For:

<END>

Nelson, Robert P.

From: Jensen, Jodi
Sent: Wednesday, December 28, 2005 4:26 PM
To: Nelson, Robert P.
Subject: Drafting Request

Hi Bob - Rep. Huebsch would like a bill draft that incorporates the following:

1. 2005 AB 766

2. Changes to Wisconsin's contingency fee limits in Chapter 655 to mirror those in California. Below is the relevant portion of the California Code. The new limits should apply regardless of whether the recovery is by settlement, arbitration or judgment. Also, the draft should maintain the current law provisions allowing a judge to exceed these amounts in exceptional circumstances and allowing an attorney to charge an hourly or per diem fee.

In light of the Governor's veto of AB 766, Rep. Huebsch may want to change the noneconomic damage limits in the bill if research indicates such a change could survive a constitutional challenge. For this reason, if it makes sense to provide a preliminary draft, please do so.

Let me know if you have any questions.

Thanks.

Jodi
4-8270

CALIFORNIA CODES BUSINESS AND PROFESSIONS CODE SECTION 6146-6149.5

6146. (a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
 - (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
 - (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
 - (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).
- (c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

Nelson, Robert P.

From: Jensen, Jodi
Sent: Friday, January 20, 2006 11:03 AM
To: Nelson, Robert P.
Subject: RE: Drafting Request

Hi Bob - I have a requested change to this: Leave out the AB 766 provisions and draft a bill that includes only the attorneys fees provisions.

Let me know if you have questions.

Thanks!

Jodi

From: Jensen, Jodi
Sent: Wednesday, December 28, 2005 4:26 PM
To: Nelson, Robert P.
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1. 2005 AB 766

2. Changes to Wisconsin's contingency fee limits in Chapter 655 to mirror those in California. Below is the relevant portion of the California Code. The new limits should apply regardless of whether the recovery is by settlement, arbitration or judgment. Also, the draft should maintain the current law provisions allowing a judge to exceed these amounts in exceptional circumstances and allowing an attorney to charge an hourly or per diem fee.

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(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

other 1/5

Preliminary

keep

2005 ASSEMBLY BILL 766

October 17, 2005 - Introduced by Representatives GIELOW, HUEBSCH, NISCHKE, GARD, FREESE, GOTTLIEB, GUNDRUM, HAHN, HONADEL, HUNDERTMARK, JENSEN, JESKEWITZ, KERKMAN, KESTELL, KREIBICH, LAMB, LOEFFELHOLZ, MCCORMICK, MOULTON, MURSAU, RHOADES, STRACHOTA, VAN ROY, VOS, M. WILLIAMS, WIECKERT, NERISON, UNDERHEIM, SUDER, FRISKE, OWENS and PETROWSKI, cosponsored by Senators S. FITZGERALD, KAPANKE, BROWN, DARLING, ELLIS, GROTHMAN, KANAVAS, KEDZIE, A. LASEE, LAZICH, LEIBHAM, OLSEN, REYNOLDS, ROESSLER, SCHULTZ, STEPP and ZIEN. Referred to Committee on Insurance.

- reger
- 1 AN ACT *to renumber* 893.55 (1); *to renumber and amend* 893.55 (4) (b) and
 2 893.55 (4) (d); *to amend* 655.017, 893.55 (2) and 893.55 (3); and *to create*
 3 893.55 (1d) and 893.55 (4) (d) 2. of the statutes; **relating to:** recovery of
 4 ~~noneconomic damages~~ *attorney fees* in medical malpractice cases.

Analysis by the Legislative Reference Bureau

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin Supreme Court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin Constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of \$550,000 for persons under the age of 18, and \$450,000 for persons age 18 and over. The bill requires the board of governors that approves any fee changes to the Injured Patients and Families Compensation Fund to report to the legislature

ASSEMBLY BILL 766

every two years any suggested changes to these noneconomic damage limits and the reasons why the changes are necessary to meet the intent of the legislature.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

insert 2-1
1 **SECTION 1.** 655.017 of the statutes is amended to read:

2 **655.017 Limitation on noneconomic damages.** The amount of
3 noneconomic damages recoverable by a claimant or plaintiff under this chapter for
4 acts or omissions of a health care provider if the act or omission occurs on or after May
5 25, 1995 the effective date of this section [revisor inserts date], and for acts or
6 omissions of an employee of a health care provider, acting within the scope of his or
7 her employment and providing health care services, for acts or omissions occurring
8 on or after May 25, 1995 the effective date of this section [revisor inserts date],
9 is subject to the limits under s. 893.55 (4) (d) and (f).

10 **SECTION 2.** 893.55 (1) of the statutes is renumbered 893.55 (1m).

11 **SECTION 3.** 893.55 (1d) of the statutes is created to read:

12 893.55 (1d) (a) In this subsection, "fund" means the injured patients and
13 families compensation fund under s. 655.27.

14 (b) The legislature finds the following related to the limitation on noneconomic
15 damages in sub. (4) (d):

16 1. Affordable and accessible health care benefits patients and the public in
17 general.

18 2. A cap on noneconomic damages is one factor necessary to maintain
19 affordability and accessibility.

20 3. A cap on noneconomic damages, together with mandatory liability insurance
21 coverage for health care providers, mandatory participation in the fund by health

ASSEMBLY BILL 766

1 care providers, and unlimited economic damage awards, ensures adequate
2 compensation for victims of medical malpractice.

3 (c) The legislature further finds that a medical liability system should promote
4 the following objectives:

5 1. Provide adequate compensation to victims of medical malpractice through
6 economic and noneconomic damages.

7 2. Protect access to health care services across the state and across medical
8 specialities by limiting disincentives for physicians to practice medicine in Wisconsin
9 such as the unavailability of professional liability insurance coverage, high cost of
10 insurance premiums, large fund assessments, or unpredictable or large noneconomic
11 damage awards as recognized by a 2003 U.S. congress joint economic committee
12 report, a 2003 federal department of health and human services study, and a 2004
13 office of the commissioner of insurance report.

14 3. Help contain health care costs by limiting the incentive to practice defensive
15 medicine, which increases the cost of patient care as recognized by a 2002 federal
16 department of health and human services study and a 2003 U.S. congress joint
17 economic committee report.

18 4. Help contain health care costs by providing more predictability in
19 noneconomic damage awards allowing insurers to set insurance premiums that
20 better reflect their financial risk as recognized by a 2003 U.S. federal department of
21 health and human services study, a 2003 government accounting office study, and a
22 2005 office of the commissioner of insurance report.

23 5. Help contain health care costs by providing more predictability in
24 noneconomic damage awards in order to protect the financial integrity of the fund
25 and allow the fund's board of governors to approve reasonable assessments for health

ASSEMBLY BILL 766

SECTION 3

1 care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001
2 legislative audit bureau report, and a 2005 office of commissioner of insurance
3 report.

4 SECTION 4. 893.55 (2) of the statutes is amended to read:

5 893.55 (2) If a health care provider conceals from a patient a prior act or
6 omission of the provider which has resulted in injury to the patient, an action shall
7 be commenced within one year from the date the patient discovers the concealment
8 or, in the exercise of reasonable diligence, should have discovered the concealment
9 or within the time limitation provided by sub. (1) (1m), whichever is later.

10 SECTION 5. 893.55 (3) of the statutes is amended to read:

11 893.55 (3) When a foreign object which has no therapeutic or diagnostic
12 purpose or effect has been left in a patient's body, an action shall be commenced
13 within one year after the patient is aware or, in the exercise of reasonable care,
14 should have been aware of the presence of the object or within the time limitation
15 provided by sub. (1) (1m), whichever is later.

16 SECTION 6. 893.55 (4) (b) of the statutes is ~~renumbered 893.55 (4) (b) 2 and~~
17 amended to read:

18 893.55 (4) (b) ~~X~~ The total noneconomic damages recoverable for bodily injury
19 or death, including any action or proceeding based on contribution or
20 indemnification and any action for a claim by a person other than the injured person
21 for noneconomic damages resulting in bodily injury, may not exceed the limit under
22 par. (d) for each occurrence on or after May 25, 1995 the effective date of this
23 paragraph [revisor inserts date], from all health care providers and all employees
24 of health care providers acting within the scope of their employment and providing

ASSEMBLY BILL 766

1 health care services who are found negligent and from the injured patients and
2 families compensation fund.

3 **SECTION 7.** 893.55 (4) (d) of the statutes is renumbered 893.55 (4) (d) 1. and
4 amended to read:

5 893.55 (4) (d) 1. The limit on total noneconomic damages for each occurrence
6 under par. (b) on or after May 25, 1995 the effective date of this paragraph [revisor
7 inserts date], shall be \$350,000 and shall be adjusted by the director of state courts
8 to reflect changes in the consumer price index for all urban consumers, U.S. city
9 average, as determined by the U.S. department of labor, at least annually thereafter,
10 with the adjusted limit to apply to awards subsequent to such adjustments \$550,000
11 for a person who is under the age of 18 at the time of the injury, and shall be \$450,000
12 for a person who is age 18 or over at the time of the injury.

13 **SECTION 8.** 893.55 (4) (d) 2. of the statutes is created to read:

14 893.55 (4) (d) 2. The board of governors created under s. 619.04 (3) shall submit
15 a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd
16 numbered year of any recommended changes to the limits on noneconomic damages
17 established in subd. 1. The report shall include the reasons why the changes are
18 necessary to meet the intent of the legislative findings under sub. (1d).

19

(END)

2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4314/?insA
RPN:.....

insert and

4 Currently, if an attorney accepts a medical malpractice case on a contingency fee basis, generally the fee is limited to the costs of the prosecution and 33 and $\frac{1}{3}$ percent of the first \$1,000,000 recovered and 20 percent of any amount recovered in excess of \$1,000,000. The court may award fees in excess of these limits in exceptional circumstances. This bill limits attorney fees to the costs of the prosecution and 40 percent of the first \$50,000 recovered, 33 and $\frac{1}{3}$ percent of the next \$50,000 recovered, 25 percent of the next \$500,000 recovered, and 15 percent of any amount recovered in excess of \$600,000. The bill also excludes the attorney's office-overhead costs and charges from the costs of the prosecution.

*one-third
(use 2x)*

**2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4314/?ins
RPN:.....

✓ *Insert 2-1*

1 **SECTION 1.** 655.013 (1m) (intro.) of the statutes is amended to read:

2 655.013 (1m) (intro.) Except as provided in sub. (1t), with respect to any act of
3 malpractice for which a contingency fee arrangement is entered into on and after
4 June 14, 1986, and before the effective date of this subsection.... [revisor inserts date],
5 in addition to compensation for the reasonable costs of prosecution of the claim, the
6 compensation determined on a contingency basis and payable to all attorneys acting
7 for one or more plaintiffs or claimants is subject to the following limitations:

8 History: 1975 c. 37, 199; 1985 a. 340. ✓

8 **SECTION 2.** 655.013 (1p) of the statutes is created to read:

9 655.013 (1p) (a) Except as provided in sub. (1t), with respect to any act of
10 malpractice for which a contingency fee arrangement is entered into on or after the
11 effective date of this subsection... [revisor inserts date], in addition to compensation
12 for the reasonable costs of prosecution of the claim, the compensation determined on
13 a contingency basis and payable to all attorneys acting for one or more plaintiffs or
14 claimants is subject to the following limitations: *shall be as follows*

- 15 1. Forty percent of the first \$50,000 recovered.
16 2. Thirty-three and one-third percent of the next \$50,000 recovered. ✓
17 3. Twenty-five percent of the *following* ~~next~~ \$500,000 recovered.
18 4. Fifteen percent of any amount in excess of \$600,000 recovered. ✓

19 (b) In this subsection, the reasonable costs of prosecution of the claim does not
20 include medical costs incurred by the plaintiff or the attorneys' office-overhead costs
21 or charges.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4314/?dn
RPN:.....

X I have added the language suggested from the California law about the plaintiff's medical costs and the attorneys' office-overhead costs and charges not being costs of prosecution, but I am not sure what is meant by "office-overhead costs and charges"? Does that mean just office rent and utilities, or does it include rent or payments for office equipment, ~~pay to support staff, and payments for~~ ^{or expenses for} investigators? Should this language be more specific, or are you content with letting the courts determine its meaning?

the titles in
In numerous places in the statutes, the phrase used is "costs, disbursements, and reasonable attorney fees" i.e. see s. 814.04, while other statutes use the phrase "fees, costs, charges, disbursements, attorney fees and any other expenses incurred in the proceeding" i.e. see ss. 186.082 (3), 187.20 (2), and 215.512 (2). The current language in this statutory section is not as clear as these other statutes.

Do you want to leave the language as drafted, or clarify the language? ✓

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4314/1dn
RPN:lmk:rs

January 25, 2006

I have added the language suggested from the California law about the plaintiff's medical costs and the attorneys' office-overhead costs and charges not being costs of prosecution, but I am not sure what is meant by "office-overhead costs and charges"? Does that mean just office rent and utilities, or does it include rent or payments for office equipment or expenses for support staff and investigators? Should this language be more specific, or are you content with letting the courts determine its meaning?

In numerous places in the statutes, the phrase used is "costs, disbursements, and reasonable attorney fees" i.e. see the titles in s. 814.04, while other statutes use the phrase "fees, costs, charges, disbursements, attorney fees and any other expenses incurred in the proceeding" i.e. see ss. 186.082 (3), 187.20 (2), and 215.512 (2). The current language in this statutory section is not as clear as these other statutes.

Do you want to leave the language as drafted, or clarify the language?

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

Nelson, Robert P.

From: Jensen, Jodi
Sent: Friday, February 03, 2006 2:19 PM
To: Nelson, Robert P.
Subject: LRB 05-4314/1 Topic: Noneconomic damages , contingency fees in medical malpractice

Attachments: 05-43141dn.pdf; 05-43141.pdf

Hi Bob -

In response to your drafter's note, please revise lines 15-17 on page 2 to provide that reasonable costs of the prosecution of the claim does not include medical costs incurred by the plaintiff or the attorney's office-overhead costs, office support staff costs or payments to consulting attorneys.

Thanks.

Jodi



05-43141dn.pdf (7 KB)



05-43141.pdf (11 KB)



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-4314/1

RPN&PJK:lmk:rs

2005 BILL

2/15

Relieu

✓+

- 1 AN ACT *to amend* 655.013 (1m) (intro.); and *to create* 655.013 (1p) of the
2 statutes; **relating to:** recovery of attorney fees in medical malpractice cases.

Analysis by the Legislative Reference Bureau

Currently, if an attorney accepts a medical malpractice case on a contingency fee basis, generally the fee is limited to the costs of the prosecution and 33 and one-third percent of the first \$1,000,000 recovered and 20 percent of any amount recovered in excess of \$1,000,000. The court may award fees in excess of these limits in exceptional circumstances. This bill limits attorney fees to the costs of the prosecution and 40 percent of the first \$50,000 recovered, 33 and one-third percent of the next \$50,000 recovered, 25 percent of the next \$500,000 recovered, and 15 percent of any amount recovered in excess of \$600,000. The bill also excludes the attorney's office overhead costs and charges from the costs of the prosecution.

and
* Office support staff costs, payments to consulting attorneys;
The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 3 SECTION 1. 655.013 (1m) (intro.) of the statutes is amended to read:
4 655.013 (1m) (intro.) Except as provided in sub. (1t), with respect to any act of
5 malpractice for which a contingency fee arrangement is entered into on and after
6 June 14, 1986, and before the effective date of this subsection [revisor inserts

BILL**SECTION 1**

1 date, in addition to compensation for the reasonable costs of prosecution of the claim,
2 the compensation determined on a contingency basis and payable to all attorneys
3 acting for one or more plaintiffs or claimants is subject to the following limitations:

4 **SECTION 2.** 655.013 (1p) of the statutes is created to read:

5 655.013 (1p) (a) Except as provided in sub. (1t), with respect to any act of
6 malpractice for which a contingency fee arrangement is entered into on or after the
7 effective date of this subsection [revisor inserts date], in addition to compensation
8 for the reasonable costs of prosecution of the claim, the compensation determined on
9 a contingency basis and payable to all attorneys acting for one or more plaintiffs or
10 claimants shall be as follows:

- 11 1. Forty percent of the first \$50,000 recovered.
- 12 2. Thirty-three and one-third percent of the next \$50,000 recovered.
- 13 3. Twenty-five percent of the following \$500,000 recovered.
- 14 4. Fifteen percent of any amount in excess of \$600,000 recovered.

15 (b) In this subsection, the reasonable costs of prosecution of the claim does not
16 include medical costs incurred by the plaintiff ^{set} ~~or the attorneys' office~~ *payments to consulting attorneys*
17 ~~or charges.~~ *and office support staff costs* ✓

18 (END)

Basford, Sarah

From: Jensen, Jodi
Sent: Tuesday, February 14, 2006 8:40 PM
To: LRB.Legal
Subject: FW: Draft review: LRB 05-4314/2 Topic: Noneconomic damages , contingency fees in medical malpractice

Attachments: 05-43142.pdf



05-43142.pdf (15 KB)

Please Jacket LRB 05-4314/2 for the ASSEMBLY.

> State of Wisconsin - Legislative Reference Bureau One East Main Street
> - Suite 200 - Madison
>
> The attached draft was prepared at your request. Please review it
> carefully to ensure that it satisfies your intent. If you have any
> questions concerning the draft or would like to have it redrafted,
> please contact Robert P. Nelson, Senior Legislative Attorney, at (608)
> 267-7511, at robert.nelson@legis.state.wi.us
> <mailto:robert.nelson@legis.state.wi.us?subject=Submitted: LRB
> 05-4314/2 Topic: Noneconomic damages , contingency fees in medical
> malpractice?body=>, or at One East Main Street, Suite 200.
>
> If you would like to jacket the draft for introduction, please click
> on the appropriate button below. Please select only one button. If you
> wish to introduce this draft in both houses please contact the
> drafting attorney to have a companion bill drafted.
>
> &Jacket for the&ASSEMBLY
> <mailto:lrbl.legal@legis.state.wi.us?subject=Draft%20Review:%20LRB
> 05-4314/2%20Topic:%20Noneconomic damages , contingency fees in medical
> malpractice&body=%0APlease%20Jacket%20LRB
> 05-4314/2%20for%20the%20ASSEMBLY.%0A>
>
> &Jacket for the&SENATE
> <mailto:lrbl.legal@legis.state.wi.us?subject=Draft%20Review:%20LRB
> 05-4314/2%20Topic:%20Noneconomic damages , contingency fees in medical
> malpractice&body=%0APlease%20Jacket%20LRB
> 05-4314/2%20for%20the%20SENATE.%0A>
>
>
> Please allow one day for jacketing. If this is a "rush" please make a
> note in your response e-mail so we are aware that we need to give this
> request a high priority.
>
> If the last paragraph of the analysis states that a fiscal estimate
> will be prepared, the LRB will submit a request to DOA when the draft
> is introduced. You may obtain a fiscal estimate on the draft prior to
> introduction by contacting our program assistants at
> LRB.Legal@legis.state.wi.us
> <mailto:LRB.Legal@legis.state.wi.us?subject=Submitted: LRB 05-4314/2
> Topic: Noneconomic damages , contingency fees in medical
> malpractice?body=> or at (608) 266-3561. If you requested a fiscal

> estimate on an earlier version of this draft and would like to obtain
> a fiscal estimate on the current version before it is introduced, you
> will need to request a revised fiscal estimate from our program
> assistants.
>
> Please call our program assistants at (608) 266-3561 if you have any
> questions regarding this email.
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